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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS LINARES GARCIA, Defendant and Appellant.	E034506 (Super.Ct.No. INF043277) **OPINION**

APPEAL from the Superior Court of Riverside County. Graham Anderson Cribbs, Judge. Affirmed.

John Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Daniel Rogers, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of two counts of robbery (Pen. Code, § 211)[1] (counts 1 and 2); two counts of assault with a firearm (§ 245, subd. (a)(2)) (counts 3 and 4); and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1)) (count 5). As to counts 1 and 2, the jury further found true that defendant personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)) and that defendant participated as a principal, knowing that another principal was armed with a firearm (§ 12022, subd. (a)(1)). As to counts 3 and 4, the jury also found true that defendant personally used a firearm in the commission of the crimes (§ 12022.5, subd. (a)). Thereafter, the trial court found true that defendant had suffered a prior strike conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). As a result, defendant was sentenced to a total term of 20 years 8 months in state prison. Defendant's sole contention on appeal is that the prosecutor committed prejudicial misconduct in her closing argument to the jury. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

A. *The Assaults (Counts 3 and 4)*

On February 9, 2003, about 1:00 a.m., Omar Garcia Gonzales was at a Food for Less store in Indio with his uncle, Jesse Bautizta. While inside the store, Gonzales and defendant accidentally made physical contact with one another, bumping one another's

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[1] All future statutory references are to the Penal Code unless otherwise stated.

left shoulders. Defendant asked Gonzales "what was wrong with" him, and the two went their separate ways.

A few minutes later, Gonzales and Bautizta left the store and were approaching their van in the parking lot when they saw defendant reach into a truck and then walk towards them. Defendant approached Gonzales and Bautizta and asked Gonzales in Spanish "what was up, why did [Gonzales] crash into him . . . ." At that point, Gonzales saw that defendant had a gun tucked in his waist. Gonzales and Bautizta explained to defendant that they did not want any problems. Defendant told Bautizta that the problem was not with him and to get into his van. Defendant spoke briefly to Gonzales before brandishing the gun that he had tucked into his waist, pointing it at Bautizta's chest while telling him to get into the van. Bautizta got into his van, as he did not want anything else to happen. Defendant then told Gonzales "not to mess with him" and pointed the gun at Gonzales's chest until defendant's friend intervened and escorted defendant away in the same truck defendant had reached into before approaching Gonzales and Bautizta. Gonzales and Bautizta wrote down the license plate number of the truck. Bautizta then called the police and told them about what had occurred.

B. *The Robberies (Counts 1 and 2)*

A Denny's Restaurant shares a parking lot with the aforementioned Food for Less store in Indio. On February 9, 2003, Virginia Sanders and Tammy Hogan were working the graveyard shift at the Denny's Restaurant when between the hours of 1:30 a.m. and 3:00 a.m. two men -- later identified as defendant and codefendant Toribio Rodriguez

Bustamante[2] -- entered the restaurant and approached the cash register at the front of the restaurant. Defendant brandished and cocked a handgun, rested it on the counter, pointed it at both Sanders and Hogan, and told them to give him the money from the cash register. Initially, Sanders was standing in front of Hogan, closer to the cash register. However, at this point, Hogan, who was the supervisor and did not want Sanders to get hurt, moved Sanders aside, stepped up to the register and handed the money to defendant. After defendant and codefendant exited the front door of the restaurant, Hogan called the police.

C. *The Arrest*

Around 2:00 a.m. on the morning of February 9, 2003, Officer Lisa Corton received a dispatch concerning the incident that had occurred in the Food for Less parking lot. The dispatcher described a male subject driving a dark blue Ford pickup truck and provided a possible license plate number. Officer Corton began driving towards the area, and seconds after the first dispatch heard another advisal pertaining to an armed robbery that had just occurred at the Denny's Restaurant. This dispatch advised that the suspects were last seen running west from the Denny's.

When Officer Corton pulled into a parking lot one block west of the Denny's, she observed a black pickup truck that matched the description given by dispatch. Officer Corton saw two males in the front seat wearing black jackets and began following the truck while she called dispatch. After she confirmed the license plate number of the

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[2] Codefendant Bustamante is not a party to this appeal. In addition, we note that the jury was unable to reach a verdict as to codefendant.

vehicle, she pulled the truck over, and another officer ordered the occupants out of the truck at gunpoint. Officer Corton identified the driver of the truck as defendant and the passenger as codefendant Bustamante. Officer Corton seized a loaded .22 caliber semiautomatic handgun and $180 in crumpled $20 bills from the front seat. The handgun was ready to be fired with a pull of the trigger -- a bullet was in the chamber, and three bullets were in the magazine. A bullet was also found in defendant's left jacket pocket. The bullet was of the same caliber and brand as the bullets found inside the handgun recovered from the truck.

D. *Defense*

Defendant testified in his own defense. He claimed that a friend gave him two pills that caused him to forget everything that happened on the night of the incidents and that he had no memory of being at the Food for Less or the Denny's Restaurant.

In rebuttal, one of the arresting officer's testified that, in her opinion, defendant was not under the influence of any drugs when she arrested him and that she did not smell alcohol on his breath.

II

DISCUSSION

Defendant contends the prosecutor committed prejudicial misconduct in her closing argument to the jury by (1) misstating the law regarding the requisite state of mind for assault and (2) arguing, in the absence of any such evidence, the gun was being used as a bludgeoning weapon. We disagree.

The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's "'"behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Under state law, a prosecutor commits misconduct only when he or she engages in overly zealous, deceptive, or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid*.; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Espinoza* (1992) 3 Cal.4th 806, 820; *People v. Price* (1991) 1 Cal.4th 324, 447; *People v. Haskett* (1982) 30 Cal.3d 841, 866.)

Prosecutors are generally given wide latitude in arguing a case, so long as the argument "amounts to fair comment on the evidence. . . ." (*People v. Hill*, *supra*, 17 Cal.4th 800, 819.) In addition, prosecutors have "broad discretion to state [their] views as to what the evidence shows . . . ." (*People v. Welch* (1999) 20 Cal.4th 701, 752.) However, prosecutors are held to a high standard at trial "because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.]" (*Hill*, at p. 820.)

During closing argument to the jury, the prosecutor argued, "The second element of an assault is the victim. Would a reasonable person in the victim's position believe, would that reasonable person believe that as a consequence of the actions they are seeing from the assailant that there is going to be an application of physical force on their person?" Defense counsel thereafter immediately objected to this as a misstatement of the law. The trial court overruled the objection.

Defendant claims this statement by the prosecutor was a misstatement of the law since it is the mental state of the attacker, not the victim, that creates criminal liability.

Assuming the prosecutor committed misconduct by misstating the requisite state of mind for assault, it was not prejudicial. Alleged misconduct is prejudicial only if it could not have been cured by admonition. (*People v. Boyette* (2002) 29 Cal.4th 381, 432; *People v. Benson* (1990) 52 Cal.3d 754, 794.) Although defense counsel immediately objected to the prosecutor's argument as a misstatement of the law, he failed to request that the jury be admonished to disregard the statement.

Furthermore, there is no evidence in the record to indicate that defendant's due process rights were impugned. (*People v. Bell* (1989) 49 Cal.3d 502, 534.) After closing arguments, the trial court instructed the jury on the elements of assault with a firearm pursuant to CALJIC No. 9.00, stating, "The person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of his act, that physical force would be applied to another person." The trial court also instructed the jury with CALJIC No. 1.02 that statements of the attorneys were not evidence and CALJIC No. 1.00 that in any conflict between the statements of the attorney and the jury instructions, the jury instructions control. It must be presumed that the jurors followed the jury instructions and were not influenced by the prosecutor's statement. (*People v. Boyette*, *supra*, 29 Cal.4th 381, 431; *People v. Bryden* (1998) 63 Cal.App.4th 159, 184; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692; *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1370 ["the jury is presumed to have read and understood the instructions given"]; see also *People v. Morales* (2001) 25 Cal.4th 34, 47 ["[t]hough we

have focused on the prosecutor's closing arguments, we do not do so at the expense of our presumption that 'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade'"].)

Moreover, the elements of assault were placed into a Power Point presentation and projected on a screen while the attorneys presented their closing arguments. The jury therefore had the benefit of viewing the elements of assault as the attorneys made their closing remarks. In addition to receiving proper instructions and viewing the elements of the crimes, the jury also had the benefit of defense counsel's own clarification of the intent element of assault with a firearm. Following the prosecutor's closing remarks, defense counsel explained, "Let's go to the second one. The person committing the act was aware of the facts that would lead a reasonable person to realize it is the direct and natural probable result of this act that physical force would be applied to another person."

Based on the foregoing, there is no possibility that the jury misunderstood the intent element of assault, and, consequently, no prejudicial misconduct occurred when the prosecutor misstated the mental element of assault.

Defendant also argues that the prosecutor committed prejudicial misconduct when she confused the jury by arguing, when there was no such evidence, that defendant could be convicted of felony assault if the gun was being used as a bludgeoning weapon, or intended as such, as a way to avoid the prosecution's obligation to prove the gun was operable.

During rebuttal closing argument, the prosecutor, in pertinent part, argued, "Having the gun as a weapon, either as a [bludgeoning] weapon or a shooting weapon

gives [defendant] the present ability at the time of the assault to carry out that assault." Thereafter, defense counsel immediately objected, stating, "That's not the state of the charge of [section] 245(a)(2)." The trial court overruled the objection.

Again, assuming the prosecutor's comment constituted misconduct, it was not prejudicial. (*People v. Boyette*, *supra*, 29 Cal.4th 381, 434-435.) Although defendant argues that "it has long been the law in California that pointing an unloaded weapon does not constitute an assault with a firearm," defendant fails to mention that the evidence was sufficient to prove the firearm was operable and loaded. Indeed, there was overwhelming evidence to show that the firearm was loaded and operable, and there was no evidence to the contrary. Officer Corton testified that she found a loaded .22 caliber semiautomatic handgun in the front seat of the vehicle that defendant and codefendant had been driving shortly after the assaults on Omar Gonzales and Jesse Bautizta. Officer Corton further stated that the semiautomatic handgun was ready to be fired with a pull of the trigger -- it had one bullet in the chamber and three bullets in the magazine. In addition, Officer Corton discovered a bullet of the same caliber and brand as those found in the loaded semiautomatic handgun recovered from the truck in defendant's jacket pocket. Furthermore, the prosecutor argued, during closing arguments to the jury, that there was sufficient evidence to show that the firearm was loaded and "was ready for use."

Hence, we cannot find that defendant was prejudiced by the prosecutor's comment concerning the use of the firearm as a bludgeoning weapon, as it is not reasonably probable that the outcome of the proceedings would have been different had the comment not occurred. (See *People v. Pigage*, *supra*, 112 Cal.App.4th 1359, 1375 [only

prosecutorial misconduct that causes prejudice requires reversal and "[a] violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward comment"].) We do not believe that the jury's verdict was in any way affected by the prosecutor's statement about the use of the handgun as a bludgeoning or shooting weapon, particularly in light of the fact that the jury had been repeatedly informed that the firearm defendant used to assault Gonzales and Bautizta was loaded and operable. (See, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 553- 554 [prosecutors brief and fleeting improper remarks were harmless error where they asserted nothing the evidence did not already suggest].)

In summary, we conclude that there was no prosecutorial misconduct so prejudicial as to violate due process and compel reversal. Defendant was not convicted because of the prosecutor's statements; he was convicted due to the state of the evidence.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

GAUT
J.